

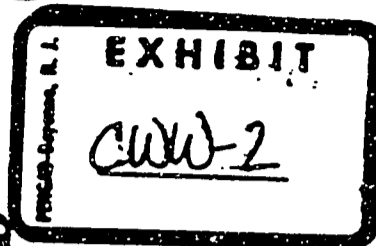


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SECRETARY OF THE ARMY  
WASHINGTON

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9 May 1983

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MEMORANDUM FOR THE SECRETARY OF DEFENSE

SUBJECT: Sensitive DOD Support [REDACTED] Activities (S)

(S) As you are aware, the Department of Defense (DOD) provides sensitive operational and logistic support to the [REDACTED] requests for DOD support are often in furtherance of [REDACTED] activities (covert action), as reviewed by the National Security Planning Group (NSPG) and approved by the President. With increasing frequency, due largely to the Presidential Findings [REDACTED] the [REDACTED] has been requesting DOD support which should be considered significant and raises some difficult policy and legal questions. Three examples of significant and sensitive DOD support which have been requested [REDACTED] in connection with its activities [REDACTED] are set forth in Tab A.

(S) The purpose of this memorandum is to raise several issues regarding the manner in which [REDACTED] requests for DOD support are reviewed within the appropriate agencies of the Executive Branch and are reported to Congress, if necessary. These types of issues have taken on special significance in light of the increased Congressional and media interest in this area. This memorandum is not intended to challenge the validity or utility of covert action as a tool of foreign policy or to call into question the process by which Presidential Findings are reviewed and approved.

(S) [REDACTED] requests for DOD support are reviewed within DOD to determine whether DOD is willing to and capable of providing the requested support. Presumably, before such requests are made of DOD, they are reviewed within the CIA and other appropriate agencies, and determined to be legal and proper. There are, however, at least four important issues which may not be receiving sufficient attention in the review process, either within or outside DOD.

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(S) First, there is a question regarding the underlying authority by which DOD provides support to [redacted] special activities. There is, of course, no explicit statutory authority for the [redacted] to conduct or the DOD to support special activities. Rather, the National Security Act, the inherent powers of the President, a Presidential Executive Order, and the Congressional authorization and appropriation process are used to authorize special activities in general. The Economy Act is usually cited as the authority by which DOD supports [redacted] special activities.

(S) Rarely has authorization or recognition of the need for DOD support been acknowledged in the Presidential Finding supporting the special activity. Recently, however,

[redacted] the Attorney General requested that DOD support to [redacted] special activities be authorized by the President. The [redacted] DOD, and the Department of Justice have agreed that foreseeable and significant DOD support (to be determined pursuant to a reasonableness test), will be noticed explicitly within the Presidential Finding and that all other support will be set forth in the scope paper which accompanies the Finding. While not as definitive as explicit statutory authority, such an arrangement will substantially solidify the authority by which DOD provides support to the [redacted] on a case by case basis.

(TS) The second major issue relates to the breath of Presidential Findings and the question of whether DOD support which is requested is consistent with and authorized by the Finding. Presidential Findings, by necessity and nature, are broad in scope, though by no means limitless. Also, Findings are often operative for a number of years. Support requests must be reviewed to determine whether they are within the legal parameters of the Finding which the request seeks to implement.

[redacted] Thus, while I executed the approval memorandum, I conditioned my approval upon an a priori notification to Congress of the exact nature of the operation given conflicting mission statements in the transmittal memoranda between the participating agencies. For this, and various other reasons, the Army raised objections to the support request and it was eventually withdrawn [redacted].

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(S) Additionally, and perhaps most importantly, requests for sensitive DOD support must be reviewed for compliance with the statutory requirements relating to Congressional oversight of special activities (50 U.S.C. § 413; 22 U.S.C. § 2422) and the War Powers Resolution (50 U.S.C. §§ 1541-1548). The CIA must, of course, inform the Congressional Intelligence Oversight Committees of all special activities. Similarly, the President must consult with and report to Congress whenever armed forces are introduced into situations involving the imminent threat of hostilities. Although the CIA is a civilian agency and is thus not governed by the War Powers Resolution, it is conceivable that a CIA special activity involving DOD support could invoke the reporting requirements of both 50 U.S.C. § 413 (with regard to the CIA special activity) and the War Powers Resolution (with regard to the involvement of U.S. armed forces). Moreover, even if the requested DOD support does not invoke the War Powers Resolution, it may invoke the 50 U.S.C. § 413 and Executive Order 12333 requirements to report to the Congressional Intelligence Oversight Committees.

(S) Finally, with regard to Central America, requests for support must also be reviewed to determine compliance with the Boland Amendment. That amendment was attached to the DOD Appropriation Act and prohibits the CIA or DOD from expending funds for the purposes of overthrowing Nicaragua or provoking a military exchange between Nicaragua and Honduras.

(S) The problem which I perceive relating to these issues is the absence of a system or process by which they are addressed. Unlike the more formal process by which Presidential Findings are reviewed within the NSPG, the above issues relating to [redacted] requests for DOD support are reviewed for legality, if at all, in an ad hoc manner, both within and outside DOD. It appears that support requests are reviewed by the Office of the General Counsel of the [redacted] only if the operational component believes that the request raises a legal issue. At the State Department, the Office of the Legal Adviser reviews all significant support requests; however, requests relating to Central America are reviewed exclusively by the Central American Management Core Group. Finally, within DOD, I do not believe that the Deputy Under Secretary of Defense (Policy) routinely solicits the review of the Office of the General Counsel. Because of the subtle, but volatile legal aspects of the issues discussed above, I

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believe it is important that all significant requests for sensitive DOD support be reviewed in a consistent and systematic manner, to include an appropriate role for the agencies' legal adviser, within and among all affected agencies. Also, such a system guarantees that the heads of each agency are aware of the scope of the agency's involvement in special activities.

(S) Within the Army, I am pleased with the review system which has been established. All requests for Army support are submitted by the JCS [redacted] officer to the Army [redacted] officer. If the request is for major end items of military equipment; the initiation of or change to any specialized, unique, or sensitive service; the initiation of or change to programs involving substantial expenditures of money; or requests which require an exception to policy, I personally review and approve the request. Before it is submitted to me, it is reviewed by the Deputy Chief of Staff for Operations and Plans, any other Army staff chief affected by the request, the Chief of Staff, and the General Counsel. The Army staff addresses primarily the question of whether the Army is capable of providing the requested support. The General Counsel examines the issues outlined above. In light of the guidance I receive, I determine whether the Army should provide the requested support.

(S) Based upon the foregoing, I believe it is important that you encourage the establishment of formal intra and inter-agency procedures, including the participation of the Department of Justice, relating to the review of requests to support [redacted] activities. In addition, because of the significance of the issues involved, the Army will continue to scrutinize for legality and propriety all arguably significant requests for military support implicating the issues noted above.

(U) If I can be of any further assistance, please feel free to contact me.

  
John O. Marsh, Jr.

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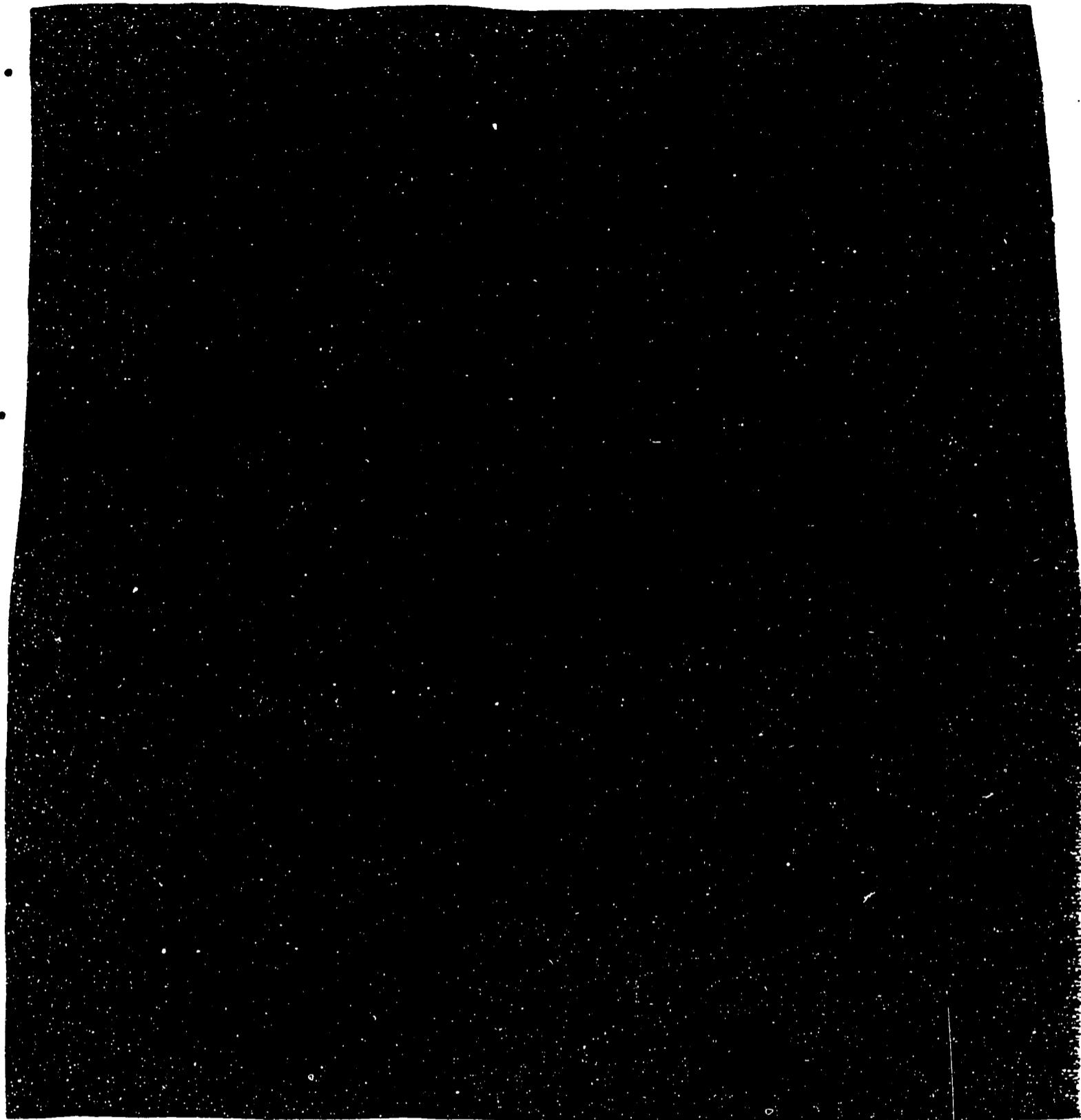
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Examples of Significant CIA Requests for Support



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